

The Honorable Paul B. Snyder

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

In re  
WASHINGTON MUTUAL, INC.,  
Debtor

Case No. 08-12229-MFW  
District of Delaware  
Chapter 11

ESOPUS CREEK VALUE LP and  
MICHAEL WILLINGHAM

Plaintiffs,

vs.

WASHINGTON MUTUAL, INC.,

Defendant

Adversary No. 10-04136

ANSWER TO FIRST AMENDED  
COMPLAINT TO COMPEL  
SHAREHOLDERS' MEETING

Defendant Washington Mutual, Inc. ("WMI") through the undersigned attorneys, answers the First Amended Complaint ("FAC") filed by Plaintiffs Michael Willingham and

ANSWER TO FIRST AMENDED  
COMPLAINT TO COMPEL  
SHAREHOLDERS' MEETING – 1  
53000-0005/LEGAL18177864.2

1 Esopus Creek Value Fund LP ("Plaintiffs"), by and through their attorneys. WMI denies all  
2 allegations unless expressly admitted herein. WMI answers the allegations in the like-  
3 numbered paragraphs of the FAC as follows:  
4  
5

6                   **I. NATURE OF ACTION**  
7

8                 1. The allegations in paragraph 1 do not require a response. To the extent that a  
9 response is required, WMI admits that Plaintiffs purport to bring this action as a result of the  
10 fact that WMI has not convened an annual shareholders' meeting but deny that they are  
11 entitled to their requested relief.  
12  
13

14                 2. Paragraph 2 contains legal conclusions to which no response is required. To  
15 the extent that paragraph 2 contains factual allegations that require a response, WMI admits  
16 that it is a publicly traded company but denies that it has not complied with U.S. Securities  
17 and Exchange Commission ("SEC") requirements or related securities laws. WMI admits  
18 that WMI and one of its subsidiaries filed for Chapter 11 bankruptcy on September 26,  
19 2008. WMI admits that since filing for bankruptcy, WMI has adopted appropriate modified  
20 reporting procedures under the SEC Staff's Legal Bulletin No. 2 and, accordingly, no longer  
21 files periodic public reports on Forms 10-Q and 10-K. Instead, WMI files its monthly  
22 operating reports with the bankruptcy court and furnishes the monthly operating reports to  
23 the SEC under cover of Form 8-K. WMI also files Form 8-K reports to report material  
24 developments concerning WMI and the bankruptcy. WMI further admits that during the  
25 pendency of the bankruptcy, WMI has not prepared audited financial statements, and has not  
26 retained an auditor. WMI denies any and all other allegations in paragraph 2.  
27  
28

29                 3. Paragraph 3 contains a legal conclusion to which no response is required. To  
30 the extent that Plaintiffs allege that WMI has not held an annual shareholders meeting since  
31  
32

1 2008, when the current board of directors was elected by WMI's shareholders, WMI admits  
2 that allegation.  
3

4 4. WMI admits that Plaintiffs purportedly seek an order pursuant to  
5 RCW 23B.070.030(1)(a) to compel WMI to convene an annual shareholders' meeting. WMI  
6 denies any and all other allegations of paragraph 4.  
7  
8

9  
10 **II. PARTIES**  
11

12 5. WMI lacks sufficient information to either admit or deny the allegations in  
13 paragraph 5 and therefore denies those allegations.  
14

15 6. WMI lacks sufficient information to either admit or deny the allegations in  
16 paragraph 6 and therefore denies those allegations.  
17

18 7. WMI lacks sufficient information to either admit or deny the allegations in  
19 paragraph 7 and therefore denies those allegations.  
20

21 8. WMI lacks sufficient information to either admit or deny the allegations in  
22 paragraph 8 and therefore denies those allegations.  
23

24 9. WMI lacks sufficient information to either admit or deny the allegations in  
25 paragraph 9 and therefore denies those allegations.  
26

27 10. WMI lacks sufficient information to either admit or deny the allegations in  
28 paragraph 10 and therefore denies those allegations.  
29

30 11. WMI lacks sufficient information to either admit or deny the allegations in  
31 paragraph 11 and therefore denies those allegations.  
32

33 12. WMI lacks sufficient information to either admit or deny the allegations in  
34 paragraph 12 and therefore denies those allegations.  
35

36 13. WMI lacks sufficient information to either admit or deny the allegations in  
37 paragraph 13 and therefore denies those allegations.  
38  
39

1           14. WMI admits the allegations in paragraph 14.  
2           15. WMI admits the allegations in paragraph 15.  
3           16. WMI admits the allegations in paragraph 16.  
4           17. WMI admits the allegations in paragraph 17.  
5           18. WMI admits the allegations in paragraph 18.  
6  
7           19. WMI admits that until September 25, 2008, it was a savings bank holding  
8 company that owned Washington Mutual Bank ("the Bank") and, indirectly, the Bank's  
9 subsidiaries, including Washington Mutual Bank fsb ("FSB"). WMI further admits that, at  
10 one time, the Bank was the largest savings and loan association in the United States of  
11 America. WMI denies any and all other allegations in paragraph 19.

12  
13           20. WMI admits that on September 25, 2008, the Office of Thrift Supervision  
14 closed the Bank and appointed the Federal Deposit Insurance Corporation as Receiver for  
15 the assets of the Bank.

16  
17           21. WMI lacks sufficient information to admit or deny the allegations in  
18 paragraph 21 and therefore denies those allegations. WMI further states that the Purchase  
19 and Assumption Agreement, Whole Bank, dated September 25, 2008, speaks for itself.

20  
21           22. WMI denies the allegations in paragraph 22.  
22  
23           23. WMI admits the allegations in paragraph 23.  
24  
25           24. WMI denies the allegations in paragraph 24 and states that Judge Walrath's  
26 order speaks for itself.

27  
28  
29  
30  
31  
32  
**III. VENUE AND JURISDICTION**

33  
34           25. WMI admits that the Thurston County Superior Court had jurisdiction over  
35 this matter pursuant to RCW 23B.07.030 and Washington law. WMI removed this action  
36 pursuant to 28 U.S.C. §§ 1452(a) and 1334(b), Rule 9027 of the Federal Rules of  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 Bankruptcy Procedure, Rule 101(e) of the Local Civil Rules of the U.S. District Court for  
2 the Western District of Washington, and Local Bankruptcy Rule 9027-1 of the U.S.  
3  
4 Bankruptcy Court for the Western District of Washington. This Court has jurisdiction  
5 pursuant to 28 U.S.C. § 1334(b), which gives district courts jurisdiction over "all civil  
6 proceedings arising under title 11, or arising in or related to cases under title 11."  
7  
8

9  
10 26. WMI admits the allegations in paragraph 26.

11  
12 27. WMI admits that venue for the state court action was proper in Thurston  
13 County. Venue for the removed action is similarly proper in this Court pursuant to 28  
14 U.S.C. § 1452(a) and Fed. R. Bankr. P. 9027.  
15  
16

17  
18 **IV. CAUSE OF ACTION**  
19

20 28. Paragraph 28 contains legal conclusions to which no response is required. To  
21 the extent that paragraph 28 contains factual allegations to which a response is required,  
22 WMI denies those allegations.  
23  
24

25 29. WMI lacks sufficient information to either admit or deny the allegations in  
26 paragraph 29 and therefore denies those allegations.  
27  
28

29 30. WMI admits the allegations in paragraph 30.  
30  
31 31. WMI admits the allegations in paragraph 31.  
32  
33 32. WMI admits the allegations in paragraph 32.  
34  
35 33. WMI admits that it held a special shareholders meeting on June 24, 2008, but  
36 denies that raising capital was the purpose of the special shareholders' meeting.  
37  
38

39 34. WMI admits the allegations in paragraph 34.  
40  
41 35. WMI admits the allegations in paragraph 35.  
42  
43 36. Paragraph 36 contains legal conclusions to which no response is required.  
44  
45 37. WMI admits the allegations in paragraph 37.  
46  
47

38. WMI admits the allegations in paragraph 38.
  39. WMI admits the allegations in paragraph 39.
  40. Paragraph 40 contains legal conclusions to which no response is required. To the extent that paragraph 40 contains factual allegations requiring a response, WMI denies those allegations.

## **DEFENSES AND AFFIRMATIVE DEFENSES**

Without admitting any of Plaintiffs' allegations or assuming the burden of an element of a cause of action or defense that would normally fall upon Plaintiffs, WMI asserts the following defenses and affirmative defenses:

- A. The FAC fails to state a claim upon which relief can be granted.
  - B. Plaintiffs lack standing to bring this action pursuant to RCW 23B.070.030 because they are not "shareholders" as defined in RCW 23B.01.400.
  - C. Any and all actions taken by WMI that are relevant to the allegations contained in the FAC were taken in good faith and in the best interests of WMI's creditors and shareholders.
  - D. Plaintiffs do not have a proper purpose in seeking an order to compel an annual shareholders' meeting, and Plaintiffs' attempt to force WMI to hold an annual shareholders' meeting constitutes clear abuse.
  - E. Plaintiffs have unclean hands and are not entitled to the relief they seek.
  - F. Plaintiffs' requested relief is barred by impracticability, impossibility and the corporate waste doctrine.
  - G. WMI is insolvent and Plaintiffs are, therefore, not real parties in interest.
  - H. The relief that Plaintiffs seek would interfere with the administration of WMI's chapter 11 case and WMI's estate.

1           I. Compelling WMI to convene an annual meeting pursuant to Plaintiffs'  
2           request and proposed order would place WMI in violation of state and federal  
3           law and WMI's by-laws.  
4  
5           J. Plaintiffs' claim is barred by the doctrine of laches, estoppel, and waiver.

6  
7  
8  
9  
10          **WHEREFORE**, WMI respectfully requests judgment:  
11  
12         a) Dismissing Plaintiffs' First Amended Complaint with prejudice;  
13  
14         b) Awarding WMI the costs of defending this action, including reasonable attorneys' fees;  
15           and  
16  
17         c) Granting such other relief as this Court may deem just and proper.

18  
19          DATED: May 19, 2010.

20  
21  
22          **PERKINS COIE LLP**

23          By:/s/ *John S. Kaplan*

---

24           William C. Rava, WSBA No. 29948  
25           WRava@perkinscoie.com  
26           John S. Kaplan, WSBA No. 23788  
27           JKaplan@perkinscoie.com  
28           David J. Burman, WSBA No. 10611  
29           DBurman@perkinscoie.com  
30           Penny Fields, WSBA No. 36024  
31           PFields@perkinscoie.com

32  
33           1201 Third Avenue, Suite 4800  
34  
35           Seattle, WA 98101-3099  
36           Telephone: 206.359.8000  
37           Facsimile: 206.359.9000  
38           Attorneys for Washington Mutual, Inc.